Hearing:
September 7, 1999

Paper No. 37
HRW

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB MARCH 7,00

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Blue Cross and Blue Shield Association

v.

American Medical Association

Opposition No. 104,657
to application Serial No. 74/583,501
filed on October 7, 1994

Elliot C. Bankendorf and Julie A. Katz of Welsh & Katz, Ltd. for Blue Cross and Blue Shield Association.

David C. Hilliard, Kevin T. Conroy,and Collette A. Durst-Barkey of Pattishall, McAuliffe, Newbury, Hillard & Geraldson for American Medical Association.

Before Walters, Wendel and McLeod, Administrative Trademark Judges.

Opinion by Wendel, Administrative Trademark Judge:

American Medical Association has filed an application to register the mark CPT for "manuals, books and pamphlets, all updated regularly, consisting of descriptions of medical procedures with assigned numeric codes and other explanatory

materials used for describing and reporting of physician services."[1]

Blue Cross and Blue Shield Association has filed an opposition to the registration of the mark on the grounds that CPT is generic and/or merely descriptive under Section 2(e)(1) and without secondary meaning. Opposer alleges that it is the licensor of over 60 independent Blue Cross and Blue Shield Member Plans which are engaged in rendering health care plans and related services; that CPT is an acronym for "current procedural terminology" and is commonly used in the health care and insurance industries by persons other than applicant; that CPT is generic and/or merely descriptive with respect to the applied-for goods; that CPT is without secondary meaning in that, upon information and belief, applicant's use has not been substantially exclusive; and that registration of the mark would compromise the right of opposer and its Member Plans to use the term CPT.

Applicant, in its answer, denied the salient allegations of the notice of opposition, although admitting that its mark CPT was "originally derived from the first letters of the phrase 'current procedural terminology'."

[1] Serial No. 74/583,501, filed October 7, 1994, setting forth first use dates of April 17, 1973. The application was later amended to one seeking registration under the provisions of Section 2(f). Applicant's claim of acquired distinctiveness was

The Record

The record consists of the file of the involved application; the testimony depositions, with accompanying exhibits, taken by applicant of Celeste Kirschner, Director, Division of CPT Editorial and Information Services of applicant; Dan Reyes, Director, CPT Information and Education Service; and Dr. Yoram Jerry Wind, an expert witness introducing a survey taken on applicant's behalf;[2] and opposer's rebuttal testimony deposition of Robert J. Lavidge, an expert witness introduced for the purpose of analyzing and challenging applicant's survey.

Although opposer took no testimony during the period for its case-in-chief, opposer filed, three days before the close of its testimony period, a notice of reliance under Trademark Rule 2.122(e). The materials sought to be introduced thereby consisted of three declarations of employees of opposer, the file wrapper of the involved application (already automatically of record under Trademark Rule 2.122(b)), and numerous printouts from Internet web sites. Applicant has objected to this evidence in its brief, arguing that none is admissible under the provisions

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supported by a declaration of five years substantially exclusive and continuous use by applicant of the mark in commerce.

[2] The purported purpose of the survey was to determine the perception of the term CPT as either a trademark or a generic designation among current and potential users of CPT manuals and the extent to which these persons associate the term CPT with applicant.

of Rule 2.122(e). Opposer has failed to make any response to applicant's objections.

Trademark Rule 2.122(e) provides for the introduction into evidence of printed publications and official records by means of a notice of reliance filed during a party's testimony period. Declarations of employees of opposer do not fall within the ambit of a notice of reliance. See Hard Rock Café Licensing Corp. v. Thomas D. Elsea, 48 USPQ2d 1400 (TTAB 1998). Instead, Trademark Rule 2.123(b) specifically provides that the testimony of any witness may be submitted in affidavit form, but only *by written agreement of the parties.* Opposer has presented no evidence of any such written agreement and applicant's objections make it obvious there was no such agreement. Accordingly, applicant's objections are sustained and the declarations will not be considered.

The Board has previously held that printouts from Internet web sites cannot be presumed to be capable of self-authentication, as is essential to qualification under Rule 2.122(e). Thus, printouts from Internet web sites do not qualify as "printed publications" which may be introduced by means of a notice of reliance. See Raccioppi v. Apogee, Inc., 47 USPQ2d 1368 (TTAB 1998). The printouts constitute the type of evidence which must be introduced by the testimony of the person who performed the Internet search,

and who can provide full access information. Opposer has failed to take testimony of this nature. Accordingly, applicant's objections are sustained and the printouts from various Internet web sites will be given no consideration.[3]

Both parties filed briefs and an oral hearing was held, although only applicant participated.[4]

The Opposition

Opposer contends in the opening paragraphs of its brief that the term CPT is not capable of functioning as a mark belonging exclusively to applicant, CPT being either generic or, at the very least, merely descriptive. As support for the claim of genericness, opposer notes, without further discussion, the three declarations of its employees, which have been excluded from evidence, *supra*. As support for the claim of mere descriptiveness, opposer points to the testimony of applicant's witness Celeste Kirschner that "CPT is a set, a particular set of procedure codes that are used by physicians and other healthcare professionals ...to describe the services that they provide." (Kirschner 5-6)[5];

[3] We would add that it is not the duty of the Board to wade through lengthy printouts to ferret out the portions being relied upon by opposer.
[4] Opposer's attorney was unable to attend, due to a last minute cancellation of her flight from Chicago.
[5] The Board does not agree with opposer's statement that Ms. Kirschner testified that CPT was an acronym for "code of procedural terminology." Her testimony, on recross examination, was that CPT was an acronym for "current procedural terminology," as was admitted by applicant in its answer.

and points to "certain of Opposer's documents ...in the Notice of Reliance."

Opposer, as the party contending that CPT is a generic term when used in connection with manuals and other publications setting forth numerical codes for various medical procedures which are used for describing and reporting physicians' services, has the burden of proving this claim. See Racine Industries Inc. v. Bane-Clene Corp., 35 USPQ2d 1832 (TTAB 1994). The only evidence of its own which opposer has even cursorily relied upon in support of this claim are the inadmissible declarations of three of its employees. Although opposer turns in its rely brief to a statement made by applicant's witness as to what the letters CPT stand for, the fact that CPT may have been acknowledged by applicant to be an acronym for "current procedural terminology" is far from evidence upon which opposer may rely as proof of perception by the relevant public of the acronym CPT as a generic term. Accordingly, opposer cannot possibly prevail on this ground of opposition. See Hester Industries, Inc. v. Tyson Foods Inc., 2 USPQ2d 1646 (TTAB 1987).

Insofar as opposer's second ground for opposition is concerned, applicant has acknowledged that CPT is merely descriptive by amending its application to one seeking

registration under the provisions of Section 2(f). Opposer, as the party opposing this registration, has the initial burden of establishing prima facie that applicant failed to satisfy the acquired distinctiveness requirement of Section 2(f). If opposer meets this burden, then applicant may find it necessary to present additional evidence to rebut opposer's showing and to establish acquired distinctiveness. See Yamaha International Corp. v. Hoshino Gakki Co, Ltd., 840 F.2d 1572, 6 USPQ2d 1001 (Fed. Cir. 1988).

Opposer, however, has offered no admissible evidence to support its case-in-chief. Thus, opposer cannot meet its burden of challenging the basis upon which applicant claimed acquired distinctiveness during the examination stage, namely, a declaration of five years' substantially exclusive and continuous use. Although opposer alleged in its notice of opposition that applicant's use of the term CPT had not been "substantially exclusive," opposer has introduced no evidence to support this allegation. Opposer's brief is focused entirely on challenging the survey which was introduced by applicant during its testimony period as additional evidence of acquired distinctiveness. Opposer's rebuttal testimony is directed to the same survey.[6]

[6] We note that applicant has introduced further evidence related to acquired distinctiveness during its testimony period in the form of witness testimony with respect to promotional efforts, advertising expenditures and sales figures, all of which opposer has never addressed.

Accordingly, opposer has failed to submit any evidence with which it might meet its burden of proof with respect to either of the pleaded grounds for opposition.

Decision: The opposition is dismissed.

C. E. Walters

H. R. Wendel

L. K. McLeod
Administrative Trademark Judges,
Trademark Trial and Appeal Board